IN THE SUPREME COURT OF CALIFORNIA

T-MOBILE WEST LLC, et al. Plaintiffs and Petitioners, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants and Respondents.	)	Case No. S238001 Appeal No. A144252 Superior Court No. CGC-11-510703

After a Decision of the Court of Appeal of the State of California,
First Appellate District, Division Five

The Superior Court of the City and County of San Francisco

The Honorable James McBride, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

*Matthew J. Gardner (SB# 257556)
Joshua S. Turner (*Pro Hac Vice* Pending)
Megan L. Brown (*Pro Hac Vice* Pending)
Meredith G. Singer (*Pro Hac Vice* Pending)
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
TEL: (202) 719-7000
FAX: (202) 719-7049
mgardner@wileyrein.com

IN THE SUPREME COURT OF CALIFORNIA

T-MOBILE WEST LLC, et al. Plaintiffs and Petitioners, v. THE CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants and Respondents.	)	Case No. S238001 Appeal No. A144252 Superior Court No. CGC-11-510703

After a Decision of the Court of Appeal of the State of California,
First Appellate District, Division Five

The Superior Court of the City and County of San Francisco

The Honorable James McBride, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

*Matthew J. Gardner (SB# 257556)
Joshua S. Turner (*Pro Hac Vice* Pending)
Megan L. Brown (*Pro Hac Vice* Pending)
Meredith G. Singer (*Pro Hac Vice* Pending)
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
TEL: (202) 719-7000
FAX: (202) 719-7049
mgardner@wileyrein.com

T. Scott Thompson (*Pro Hac Vice* Pending)
Martin L. Fineman (SB#104413)
Daniel Reing (*Pro Hac Vice* Pending)
DAVIS WRIGHT TREMAINE, LLP
505 Montgomery Street, Suite 800
San Francisco, C.A. 94111-6533
TEL: (415) 276-6500
FAX: (415) 276-6599
martinfineman@dwt.com

Counsel for Plaintiffs and Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other References

INTRODUCTION

Telecommunications providers are on the cusp of unleashing revolutionary fifth generation ("5G") wireless technology that will usher in a new era of innovation. Californians have historically been on the cutting edge of such innovation, helped in part by a long-standing, state-wide commitment to encourage the deployment of new telecommunications technologies. But ordinances like that enacted by the City and County of San Fransisco ("the City") here mark a 180-degree turn. By singling out advanced technologies for discretionary (and discriminatory) "aesthetic" review, regardless of the actual impact these facilities have, these ordinances impose substantial roadblocks to innovation. The court below upheld the City's intrusion on California's well-established State franchise. Municipalities around the State are taking note and are implementing their own restrictions on wireless buildouts.

This Court should grant review for three reasons, none of which were refuted by the City. *First*, there is a split of authority over the proper standard of review for facial preemption challenges, a point which the City is forced to concede. (Ans. 9, fn. 6.) The City argues that this case is not the "ideal" vehicle for review because the standard of review was not outcome determinative. The court's opinion below belies that claim. This Court has an important role to play in clarifying the appropriate standard of review and preserving State policy from local encroachment, as amici urge.

Second, this Court should resolve a split of authority created by the decision below over municipal power to regulate rights-of-way. The court below departed from decades of precedent establishing that municipal interests must yield to the State's goal of fostering the deployment of advanced telecommunications. (See, e.g., *Pacific Telephone & Telegraph Co. v. City of Los Angeles* (1955) 44 Cal.2d 272, 282 (*Los Angeles*).) Contrary to the Legislature's considered preference, the decision below endorses municipal power to discriminate against innovative technologies.

Third, this Court should clarify the meaning of Section 7901.1 of the Public Utilities Code.[1] Section 7901.1 permits municipalities to exercise "reasonable control" over the "time, place, and manner" of access to public rights-of-way, so long as all entities are treated "in an equivalent manner." The court below held that this provision applies only to *temporary* activities. The City's Answer offers no new defense for this illogical reading of the Code.

The City's claim that the decision will not impact California consumers is especially misplaced. If allowed to stand, the decision will have far-reaching and harmful consequences for Californians. It invites discriminatory regulation that will impede citizens' access to new technologies—exactly what the State franchise was designed to secure.

---

[1] Unless indicated, all statutory citations are to the Public Utilities Code.

The City's claim that these harms could be addressed by the Legislature misses the point. While the Legislature could act to mitigate the damage from the Court of Appeal's decision, it should not have to do so. The Legislature has already spoken on this issue by enacting the statewide franchise in Section 7901 and the limits on local regulation in Section 7901.1.

This Court should grant review to address these important conflicts of law and protect Californians' access to cutting edge technology.

DISCUSSION

I. THE CITY CONFIRMS THERE IS A CONFLICT REGARDING THE STANDARD OF REVIEW IN FACIAL PREEMPTION CHALLENGES.

As the Petition demonstrated, neither this Court nor the U.S. Supreme Court applies the rigorous "no set of circumstances" test to facial preemption challenges. By adopting it, the decision below furthers a growing divide amongst California lower courts over the proper standard of review for these challenges. Some lower courts invoke the "no set of circumstances" test—known at the federal level as the *Salerno* standard—while others decline to apply or even discuss it. (Compare Opn. 8 [applying the test and upholding the City's Ordinance] with *Fiscal v. City*

& County of San Fransisco (2008) 158 Cal.App.4th 895 [applying a less demanding standard and preempting an ordinance].)[2]

The City concedes that the issue is not "entirely settled," (Ans. 9, fn. 6.), but claims that this case is not an "ideal" vehicle for review because here the "no set of circumstances" test was not outcome determinative. (Ans. 5-8.) The City is wrong. This case offers this Court an excellent opportunity to address this critical question.

A. <u>This Court Should Resolve The Split Of Authority Over The Proper Standard Of Review In Facial Preemption Challenges.</u>

The City cannot offer a coherent rebuttal to Petitioners and amici's argument that there is a significant conflict over the applicable standard of review in facial preemption challenges. (Pet. 11-12; Chamber of Commerce Amicus Letter 2-5) It asserts that there is no "disuniformity," but concedes that the proper test is not "entirely settled." (Ans. 9, fn. 6.) The City cannot have it both ways. Petitioners and amici established that the Court of Appeal's use of the "no set of circumstances" standard here is out of step with both California and U.S. Supreme Court precedent. (Pet. 12-17; Chamber Amicus Letter 2-5.) This Court has decided countless preemption cases without ever invoking the *Salerno* test. (See, e.g., *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th

---

[2] Where lower courts do invoke *Salerno*, it is often with little or no analysis. (See, e.g., *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162, 173.)

1239, 1251-57; *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067-72.) And the U.S. Supreme Court has likewise recognized that *Salerno* has no place in the preemption context. (See *Arizona v. United States* (2009) 132 S.Ct. 2492, 2500-01.)

California's lower courts, however, are divided on the proper standard. (Compare *Fiscal*, *supra*, 158 Cal.App.4th at p. 903-04 [avoiding *Salerno* altogether] with *Sierra Club*, *supra*, 205 Cal.App.4th at p. 173 [applying *Salerno*].) The City's Answer tries to paper over the division by conflating the "no set of circumstances" and "total and fatal conflict" tests, and claiming that the two standards are "in essence" the same. (Ans. 8.)

The two standards are not the same. This Court has never equated the "total and fatal conflict" standard, used in many California preemption cases, with the inflexible "no set of circumstances" test improperly imported from federal courts. A local ordinance can be in "total and fatal conflict" with State law and policy even if there are some hypothetical circumstances where the outcomes would align. In fact, a local law that undercut State objectives in even a large percentage of cases would likely be in "total and fatal conflict" with State law.

The City's reliance on *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, to equate the standards is mistaken. *Lungren* merely confirmed that *Salerno* has no place in the context of abortion rights. *Lungren* does not discuss, let alone analyze, any relationship between the

"no set of circumstances" and the "total and fatal conflict" tests. (*Id.* at p. 347-48; see also Rehearing Or. at p. 2 [distinguishing abortion cases as inapposite].) It simply clarifies that neither test would be appropriate in the abortion context.[3] (*Ibid.*)

Facial preemption challenges are necessarily subject to a less demanding standard. In the paradigmatic *Salerno* case, the court applies the "no set of circumstances" test to preserve legislative flexibility and ensure that laws are not invalidated because of hypothetical or isolated fact patterns. (See *United States v. Salerno* (1987) 481 U.S. 739.) In contrast, the inquiry in the facial preemption context is not about preserving legislative authority; it is about where to draw the line between a superior and lesser sovereign. In that context, there is no reason to give the lesser sovereign the latitude afforded by *Salerno*. Indeed, the opposite is true—courts must err on the side of ensuring that the parochial interests of the lesser sovereign do not interfere with State objectives. (See, e.g., *Action Apartment Assn. Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1247.)

The City's attempt to minimize the split ends up underlining it. (Ans. 9 [citing *Fiscal, supra,* 158 Cal.App.4th at p. 895; *San Fransisco Apartment Assn. v. City & County of San Fransisco* (2016) 3 Cal.App.5th

[3] The City cites several cases that it claims apply the *Salerno* standard in facial preemption challenges. (Ans. 8 [citing cases].) But the City is mistaken; these cases invoke the "total and fatal conflict" standard. (*Ibid.*)

463 (*San Francisco Apartment*)].) For example, the City tries to side-step *Fiscal* by arguing that the case "did not even discuss" the "no set of circumstances" test. (Ans. 9.) But that is precisely the point. *Fiscal* did not invoke *Salerno* because that standard has no place in a facial preemption challenge. It is irrelevant that *Fiscal* did not expressly disavow the standard.

The City also misreads *San Francisco Apartment*, claiming that it "expressly approved" the "no set of circumstances" test. (Ans. 9.) *San Fransisco Apartment* did no such thing. Rather, *San Francisco Apartment* rejected the stringent "no set of circumstances" standard and preempted a city ordinance "despite one or more conceivable set of circumstances under which the Ordinance and the Ellis Act could operate consistently." (*San Francisco Apartment*, *supra*, 3 Cal.App.5th at p. 487.) *San Francisco Apartment* and *Fiscal* demonstrate that the Court of Appeal's endorsement of the *Salerno* standard is out of step with precedent and creates a split of authority that this Court should address.

B. The City's Claim That This Case Is Not A Proper Vehicle For Review Is Wrong.

Because it must concede that the law is unsettled, the City's primary response is that this case is not an "ideal" vehicle for resolving the split. In the City's view, the Court of Appeal's application of the "no set of circumstances" test was not outcome determinative. (Ans. 5-8.) But

nothing in the Court of Appeal's decision suggests that it would have arrived at the same result had it applied a different test. The court explicitly invoked the "no set of circumstances" standard in its holding, emphasizing that "Plaintiffs have not met their burden to show local government can *never, in any situation*, exercise discretion to deny a permit for a particular proposed wireless facility." (Opn. 15, original italics.)

The opinion's reliance on hypotheticals confirms that the "no set of circumstances" standard *was* outcome determinative. (See Opn. 22 [upholding the Ordinance because the court could "imagine" a scenario where a wireless facility "might aesthetically 'incommode' the public use of the right-of-way," if, for example, it was installed "very close to Coit Tower or the oft photographed 'Painted Ladies'"].) Such hypotheticals are only relevant in the rigid *Salerno* context, which requires courts to attempt to "dream up" scenarios where application of the challenged law might be valid.[4] (*Bruni v. City of Pittsburgh* (3d Cir. 2016) 824 F.3d 353, 363.) The City attempts to downplay the significance of these hypotheticals, arguing they are mere examples of scenarios under which it could deny an application consistent with the Ordinance and Section 7901. (Ans. 7.) But this kind of ill-advised hypothesizing "underscores the flaws inherent" in

---

[4] As Petitioners explained, the Ordinance does not apply near Coit Tower or the Painted Ladies, meaning that the court's hypothetical did not even relate to the real world effects of the Ordinance. (See Pet. 21.)

the *Salerno* standard and compels review. (*Doe v. City of Albuquerque* (10th Cir. 2012) 667 F.3d 1111, 1123.)

This is an excellent case for clarifying the test for facial preemption. It squarely presents a facial preemption challenge without the distraction of a factual dispute. The question is neither academic nor semantic. It directly affects litigants' ability to vindicate State law and policy. This alone is reason to grant review and nothing in the City's Answer justifies this Court's inaction. With the lower courts divided, we respectfully request the Court "say what the law is" and resolve the ambiguity. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 469.)

II. THE DECISION BELOW MISREAD SECTION 7901 AND CREATED A SPLIT OF AUTHORITY OVER MUNICIPAL POWER.

Under Section 7901, municipalities cannot erect barriers to progress by discriminating against particular communications services. The Court of Appeal turned this regime on its head, allowing the City to "adjust the balance" between "technological advancement and community aesthetics" by singling out one type of technology for disfavored treatment. (Opn. 1.)

A. California Courts Have Long Rejected Local Discrimination Against New Technologies.

California courts have long understood that Section 7901's principal purpose is to promote emerging forms of communications technology throughout the State. (See *Pacific Telephone & Telegraph Co. v. City of*

Los Angeles (1959) 51 Cal.2d 766, 770 [extending the State franchise benefits from telegraph corporations to nascent telephone companies] (*Pacific Telephone I*).) For this reason, courts have interpreted Section 7901 broadly, to foster "modern facilities" that were "not in existence" when the Legislature enacted the franchise. (*Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1961), 197 Cal.App.2d 133, 147 (*Pacific Telephone II*).) Extending the franchise to new technologies has given California state-of-the-art communications systems, which in turn have been integral to the State's unquestioned leadership role in the development of new technology generally. (See *ibid.* ["[T]he people expect [telephone companies] to use the most modern equipment."].)

Los Angeles, *Pacific Telephone II*, and *Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, all promote innovation and prohibit discrimination against new communications systems. For example, in *Los Angeles*, *supra*, 44 Cal.2d at page 282, this Court rejected the argument that a telephone company's State franchise right was limited to transmissions of "articulate speech," reasoning that "[s]uch a result would ... interfere substantially with the ability of telephone companies to provide adequate communication service to the people of the state." The Court of Appeal's decision here will interfere much more with this franchise right; rather than the "numerous local

franchises" that troubled the Court in *Los Angeles,* wireless companies will now need to get hundreds or thousands of site-by-site approvals.

Likewise, *Williams*, *supra*, 114 Cal.App.4th at page 651, interpreted Section 7901 to extend to "different forms of information, such as voice, music, video, computer data, facsimile material and other forms" over fiber optic facilities. And *Pacific Telephone II*, *supra*, 197 Cal.App.2d at page 146, dismissed San Francisco's claim that the State franchise did not extend to "the placing of telephone wires under ground" because such a reading would stifle technological progress.

The City attempts to strip these cases of importance by narrowing them beyond recognition. (Ans. 10-12.) In the City's view, *Los Angeles* and *Williams* merely established that municipalities could not prescribe the form of communications transmitted over telephone lines. (Ans. 10-11.) And to the City, *Pacific Telephone II* holds only that franchise holders may place facilities underground. (Ans. 11-12.) This ignores the broader point animating all three cases: Section 7901 promotes the deployment of the most advanced communications technology, and supersedes local attempts to limit the franchise.

B. Section 7901 Prohibits The Use Of Local Police Power To Discriminate Against Technologies.

The City also tries to evade *Los Angeles, Williams*, and *Pacific Telephone II* by asserting that the Ordinance is a valid act of its police

power. (Ans. 12 [citing *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 886 [noting that aesthetic permit conditions "have long been held to be valid exercises of the city's traditional police power"]; *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410, 1416 ["settled ... that cities can use their police power to adopt ordinances for aesthetic reasons"]].)

Neither *Ehrlich* nor *Disney* and their unremarkable description of local interest in aesthetics is relevant here. Neither involved any municipal power affected by Section 7901. *Ehrlich, supra*, 12 Cal.4th at page 885-86, dealt with a municipal ordinance requiring certain buildings to include a mandated amount of art work, or to contribute to the city art fund. *Disney, supra*, 194 Cal.App.4th at page 1412, involved an ordinance limiting the storage of recreational vehicles on residential property. Unlike this case, *Ehrlich* and *Disney* did not implicate "a matter of state concern" like telecommunications progress. (*Pacific I, supra*, 51 Cal.2d at p. 774. See also Gov't Code § 65964.1(c) ["The Legislature finds and declares that a wireless telecommunications facility has a significant economic impact in California and is not a municipal affair..., but is a matter of statewide concern."].)

Section 7901 is a limit on police power that restricts the traditional role of local governments when it comes to State franchise activities like the placement of utilities. Cities may only restrict utility placement if it would "incommode the public use of the road or highway or interrupt the

navigation of the waters." (§ 7901; accord, *Sprint PCS Assets, L.L.C. v. City of La Cañada Flintridge* (9th Cir. 2006) 182 F.App'x 688, 690.)

Courts, including this Court, have interpreted "incommode the public use" narrowly, allowing localities to regulate only so "as to prevent unreasonable obstruction of travel" by placement of poles and wires. (*Western Union Telegraph Co. v. City of Visalia* (1906) 149 Cal. 744, 750-51; accord *Pacific Telephone II, supra,* 197 Cal.App.2d at p. 146 ["Obviously, the Legislature ... knew that the placing of poles, etc., in a street would of necessity constitute some incommodity to the public use, but the restriction necessarily is limited to an unreasonable obstruction."].) Indeed, in *Pacific Telephone II, supra*, 197 Cal.App.2d at page 152, the Court of Appeal expressly held that a municipality's "narrower police power" under Section 7901 includes "only state power to deal with the health, safety and morals of the people," and explicitly referred to *Visalia* where this Court defined "incommode" as meaning unreasonable obstruction of traffic. This power is different from power to regulate based on aesthetic concerns. (See, e.g., *Berman v. Parker* (1954) 348 U.S. 26, 32; *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1024.) Reading "incommode" to permit local regulation based on a broad notion of aesthetics directly contradicts this case law.

Until the decision below, California courts never suggested that telecommunication facility deployments may "incommode the public use of

the road" or "interrupt the navigation of the waters" based on appearance or annoyance. (Opn. 19.) Indeed, *Pacific Telephone II* rejected that proposition. *Pacific Telephone II, supra*, 197 Cal.App.2d at p. 146. To reach this conclusion, the Court of Appeal relied in part on non-binding federal authority. (*Ibid.* [citing *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates* (9th Cir. 2009) 583 F.3d 716].) The Ninth Circuit viewed this as an important enough issue of State law that it sought guidance from this Court; when this Court declined to intervene, the Ninth Circuit went ahead and interpreted State law anyway. (*Palos Verdes, supra,* 583 F.2d at 721 fn. 2.)

By relying on *Palos Verdes*, the Court of Appeal created a new split of authority and contradicted decades of precedent holding that Section 7901 proscribes localities from using police power to discriminate against new technology. This Court should reject the City's attempt to read these principles out of the case law, and vindicate California's interest in promoting technological advancement.

III. THIS COURT SHOULD CLARIFY THAT SECTION 7901.1 FORBIDS THE CITY FROM DISCRIMINATING AGAINST NEW TECHNOLOGIES.

The City's Answer offers nothing new on Section 7901.1, asserting (as the court below held) that this reservation of municipal authority over construction in the rights-of-way applies only to temporary activities. This

Court should grant review to reject this overly restrictive and illogical interpretation.

Section 7901.1 states that municipalities have "the right to exercise reasonable control as to the time, place, and manner in which roads, highways, and waterways are accessed," (§ 7901.1(a)) subject to the requirement that control "at a minimum ... be applied to all entities in an equivalent manner" (§ 7901.1(b)).

The natural reading of the text is that localities retain some control over where and how facilities are placed in the rights-of-way, despite the broad franchise granted in Section 7901. But this interpretation would require the City to accept that the non-discrimination provision in 7901.1(b) applies broadly to all regulation of rights-of-way use under Section 7901—a test that the Ordinance cannot meet.[5] Thus, the City is forced to assert that Section 7901.1 should be read narrowly, applying only to *temporary* occupation of rights-of-way, such as construction activities. (Ans. 14-15.)

The Legislature could not have intended such bizarre results. The City invokes legislative history to suggest that Section 7901.1 should be limited to temporary rights-of-way occupation. (Ans. 14-15 [citing Opn.

[5] The City asserts that "[n]othing in [Section 7901.1(b)] requires San Francisco to require similar permits for different types of utility facilities where there are no similar concerns." (Ans. 16.) The City's suggestion that it is treating all facilities similarly is absurd. The record shows that the wireless facilities subject to the Ordinance are the same size or smaller than the other telecommunications facilities to which the Ordinance does not apply and which require no site-specific permit. (Opn. 6; Pet. 25-26.)

22-25].)[6] The passages cited characterize Section 7901.1 as pertaining to the management of "construction." (Ans. 14.) Yet Section 7901 uses the same terminology: it authorizes telephone companies to "construct" and "erect" facilities. (§ 7901.) The City does not read Section 7901 to apply only to providers' temporary occupation of rights-of-way during construction. The City offers no explanation why references to "construction" in the legislative history of Section 7901.1 support a temporal limitation while the same term in Section 7901 does not.

Nor does "time, place, and manner" suggest that Section 7901.1 has a temporal limitation. As Petitioners explained, and the City does not address, lawful time, place, and manner restrictions in the First Amendment context frequently extend for the full duration of occupation of a public place. (Pet. 35-36.)

Reading Section 7901.1 as the City would—to authorize discrimination among providers at any time other than temporary use during construction—would "defeat the very purpose of section [7901], as it would interfere substantially with the ability of telephone companies to provide adequate communication service to the people of the state." (*Los*

---

[6] The City fails to note that the same legislative history also characterizes the scope of local authority reserved under Section 7901 as "limited"—precisely the opposite of the City's argument in Section II above. (See, e.g, Sen. Rules Com., Sen. Floor Analyses, 3d Reading, Sen. Bill No. 621 (1995–1996 Reg. Sess.) as amended May 3, 1995, p. 1.)

Angeles, supra, 44 Cal.2d at p. 282.) This court should grant review to clarify the broad application of Section 7901.1's non-discrimination clause.

IV. THE COURT CANNOT IGNORE THE HARMFUL EFFECTS OF THE LOWER COURT'S DECISION.

The City urges this Court to ignore the consequences of its intrusion into State control over telecommunications providers. *First*, the City claims that any issues from its encroachment upon State authority can be rectified by the Legislature. (Ans. 17.) *Second*, it argues that there is no reason for concern because "San Francisco has granted 98% of Petitioners' applications for Wireless Facilities permits." (*Ibid.*) Both arguments gloss over the effect of the Ordinance, its subversion of State policy, and the critical role that this Court's review plays in protecting California law.

The Legislature has determined the appropriate balance between the statewide franchise, local authority, and technological advancement. (See *Williams, supra*, 114 Cal.App.4th at p. 654 [internal quotations omitted].) The Court of Appeal's decision invites local governments to strike their own balances, usurping the State.

For decades, Section 7901 and State policy prevented localities from rebalancing priorities embodied in the State franchise. But some California localities have been hostile to wireless deployments. (See Comments of the California Wireless Association, Federal Communications Commission, WC Docket No. 11-59, at 6-7 (filed Sept. 30, 2011)

<https://ecfsapi.fcc.gov/file/7021712388.pdf> [discussing the rise of litigation against municipalities over policies impeding wireless deployments].) Enactments like the Ordinance slow progress. This is troubling because infrastructure investment and deployment is increasingly critical to connectivity, broadband, and innovative services. (See Remarks of FCC Chairman Tom Wheeler, *The Future of Wireless: A Vision for U.S. Leadership in a 5G World* (FCC 2016) 2016 WL 3430263 [noting the importance of infrastructure deployments to 5G innovation]; WIA Amicus Letter 5-6 [same].) If cities can discriminate against new technology, Californians may be forced to wait months or years for new technology, putting them in the unaccustomed position of being technological followers rather than leaders. Protecting Section 7901 against local encroachment is essential to California's pro-innovation policy objectives. (See WIA Amicus Letter 1-4 [underscoring the negative impact the decision below will have on access to innovative technology].)

The City downplays these dangers by noting that it has granted the vast majority of facility applications. (Ans. 17) This statistic fails to capture the negative effects of an unlawful discretionary ordinance on incentives and costs. Even if most applications are granted, providers must incur the uncertainty and costs of a longer and discretionary siting process, find coverage solutions where applications are slowed or denied, and may refrain from submitting applications or considering the City for

deployments. More fundamentally, the City's statistic reflects operations while this litigation was pending, and under a regime in which the State franchise was meaningful. If the Court of Appeal's ruling stands, localities will strike their own "balances" and may invoke concerns about "aesthetics" even more aggressively.

CONCLUSION

Petitioners respectfully request that the Court grant their Petition for Review and reverse the Court of Appeal, and direct that court to enter an order invalidating the Ordinance.

Dated: November 28, 2016 Respectfully Submitted,

Matthew J. Gardner (SB# 257556)
Joshua S. Turner (*Pro Hac Vice* Pending)
Megan L. Brown (*Pro Hac Vice* Pending)
Meredith G. Singer (*Pro Hac Vice* Pending)
WILEY REIN LLP
1776 K Street, N.W.
Washington, D.C. 20006
TEL: (202) 719-7000
FAX: (202) 719-7049
mgardner@wileyrein.com

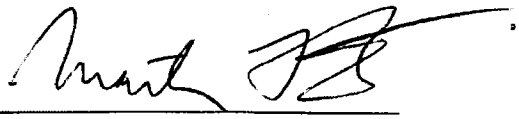
T. Scott Thompson (*Pro Hac Vice* Pending)
Martin L. Fineman (SB#104413)
Daniel Reing (*Pro Hac Vice* Pending)
DAVIS WRIGHT TREMAINE, LLP
505 Montgomery Street, Suite 800
San Francisco, C.A. 94111-6533
TEL: (415) 276-6500
FAX: (415) 276-6599
martinfineman@dwt.com

Counsel for Plaintiffs and Petitioners

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), the undersigned certifies that this Reply to Answer to Petition for Review contains 4,198 words as counted by the word count feature of the Microsoft Word program used to generate this brief, not including the tables of contents and authorities, the cover information, the signature block, and this certificate.

Dated: November 28, 2016

By: 

Martin L. Fineman

CERTIFICATE OF SERVICE

I, Martin L. Fineman, declare as follows:

At the time of service, I was over 18 years of age and not a party to this action. I am employed in San Francisco, California. My business address is 505 Montgomery Street, Suite 800, San Francisco, California 94111-6533. On November 28, 2016, I served true copies of the document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows: **SEE ATTACHED SERVICE LIST**

BY FEDERAL EXPRESS: I served the forgoing documents by Federal Express for overnight delivery. I placed true copies of the document(s) in a sealed envelope addressed to each interested party as identified above. I placed each such envelope, with Federal Express fees fully prepaid, for collection and delivery at Davis Wright Tremaine LLP, San Francisco, California. I am familiar with Davis Wright Tremaine LLP's practice for collection and delivery. Under that practice, the Federal Express package(s) would be delivered to a courier or dealer authorized to receive document(s) on that same date in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 28, 2016, at San Francisco, California.

Martin L. Fineman

SERVICE LIST

William Sanders, Esq.
Deputy City Attorney
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102
Counsel for Defendants and Respondents

Erin Bernstein, Esq.
Deputy City Attorney
City and County of San Francisco
Fox Plaza
1390 Market Street, 7th Floor
San Francisco, CA 94102
Counsel for Defendants and Respondents

Jeffrey Melching, Esq.
Ajit Singh Thind, Esq.
RUTAN & TUCKER, LLP
611 Anton Boulevard, Suite 1400
Costa Mesa, CA 92929
Counsel for Amici Curiae League of California Cities, California State Association of Counties, and SCAN NATOA, Inc.

D. Zachary Champ, Esq.
Director, Government Affairs
D. Van Flet Bloys, Esq.
Senior Government Affairs Counsel
WIRELESS INFRASTRUCTURE ASSOCIATION
505 Montgomery Street, Suite 500
Alexandria, VA 22314
Counsel for Amicus Curiae, the Wireless Infrastructure Association

Matthew S. Hellman, Esq.
Scott B. Wilkens, Esq.
Adam Unikowsky, Esq.
Erica Ross, Esq.
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001
Counsel for Amicus Curiae, the Chamber of Commerce of the United States of America

Janet Galeria, Esq.
U.S. Chamber Litigation Center
1615 H Street, NW
Washington, DC 20062
Counsel for Amicus Curiae, the Chamber of Commerce of the United States of America